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17 UNITED STATES OF AMERICA

18 UNITED STATES DISTRICT COURT

19 FOR THE CENTRAL DISTRICT OF CALIFORNIA

20 UNITED STATES OF AMERICA,

21 No. ED CR 18-231-JGB

22 Plaintiff,

23 GOVERNMENT'S REPLY IN SUPPORT OF  
EX PARTE APPLICATION FOR  
PROTECTIVE ORDER REGARDING PRIVACY  
OF VICTIM AND WITNESS INFORMATION

24 v.  
25 JOHN JACOB OLIVAS,

26 Defendant.

27 Plaintiff United States of America, by and through its counsel  
28 of record, the United States Attorney for the Central District of  
California and Assistant United States Attorneys Julius J. Nam and  
Eli A. Alcaraz, hereby files a reply in support of its ex parte  
application for an order limiting use and wider disclosure of the  
discovery ("Protective Order") in this case.

29 The opposition filed by defendant JOHN JACOB OLIVAS on April 16,  
30 2019 (Dkt. No. 26) misstates the law, the proposed Protective Order,  
31 and the government's good-faith attempts to balance the privacy  
32 interests of the victims and third parties against defendant's need  
33 to present a vigorous defense. The Protective Order offers a

1 reasonable path forward that balances the competing interests present  
2 in this case by preventing dissemination of the discovery to third  
3 parties, permitting defendant to take possession of the discovery  
4 except as designated by the government (which will be limited to  
5 personally identifiable information of victims and third parties as  
6 well as depictions of sexual acts between defendant and the victims),  
7 and permitting defendant to review all discovery in the "Defense  
8 Team's" possession. The Court should grant the ex parte application  
9 (Dkt. No. 23) and issue the Proposed Order as presented.

10 **I. AMPLE GOOD CAUSE EXISTS TO ISSUE THE PROTECTIVE ORDER**

11 Pursuant to Federal Rule of Criminal Procedure 16(d)(1), "[a]t  
12 any time the court may, for good cause, deny, restrict, or defer  
13 discovery or inspection, or grant other appropriate relief" (emphasis  
14 added). Rule 16 further provides that "[t]he court may permit a  
15 party to show good cause by a written statement that the court will  
16 inspect ex parte" (emphasis added).

17 As evident in the language of Rule 16, good cause may be found  
18 "[a]t any time" for the issuance of a protective order, not just at  
19 the beginning of a case. Contrary to defendant's suggestion in the  
20 opposition, good cause to enter a protective order placing reasonable  
21 limits on the handling and dissemination of sensitive discovery  
22 materials does not expire with passage of time. Nor does a party  
23 forfeit its right to seek a protective order by not seeking one at  
24 the outset of a case. Regardless of when a party makes a request for  
25 a protective order, the Court's inquiry should be whether good cause  
26 exists, rather than when the request was made or whether the request  
27 should have been made earlier. "At any time," this Court may find

1 good cause to issue the Protective Order requested by the government,  
2 as Rule 16 makes clear.

3 Furthermore, Rule 16's provision that a court "may permit" a  
4 party to make a good cause showing ex parte demonstrates, in turn,  
5 that Rule 16 does not require such a showing. Otherwise, Rule  
6 16(d)(1) would have read "shall require," rather than "may permit."  
7 Relying on this language, one court in the Ninth Circuit has even  
8 held that that Rule 16 "does not require a party to demonstrate good  
9 cause; it requires that the Court act for good cause." United States  
10 v. Chow, No. CR 14-00196 CRB, 2014 WL 2093488, at \*1 (N.D. Cal. May  
11 19, 2014) (explaining Rule 16(d)(1)'s good cause requirement).

12 Here, in the ex parte application, the government has presented  
13 the Court with ample good cause to enter the Protective Order because  
14 "[t]he discovery contains a substantial amount of personally  
15 identifiable information ('PII') of victims, witnesses, and other  
16 individuals unrelated to this case, including personal names, social  
17 security numbers, dates of birth, home addresses, and telephone  
18 numbers," and "the discovery includes private and sensitive  
19 information pertaining to victims such as photographs and video  
20 recordings of explicit sexual acts - some of which were made without  
21 consent by the victim involved and later transmitted by defendant to  
22 the victim in an apparent attempt to blackmail the victim into  
23 silence and to humiliate the victim." (Ex Parte Application, Dkt.  
24 No. 23, ¶ 3.) That showing of good cause for a protective order is  
25 consistent with what this Court has approved in many other cases,

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1 including deprivation of civil rights cases.<sup>1</sup> Also, as noted in the  
 2 ex parte application, the government's request is consistent with the  
 3 substantial concerns for privacy and sensitive materials found in  
 4 Federal Rule of Criminal Procedure 49.1, the Central District of  
 5 California's Local Rules regarding redaction (L.R. 5.2-1), and the  
 6 Privacy Policy of the United States Judicial Conference  
 7 ([https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-  
 policy-electronic-case-files](https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files) (last accessed April 17, 2019)).

9 Indeed, the showing made in the government's ex parte application is  
 10 sufficient to establish good cause. Nothing more is required.

11 Defendant wrongly asserts in the opposition that the Ninth  
 12 Circuit has required that the party seeking a protective order in a  
 13 criminal case should make a good cause showing as to each discovery  
 14 item and demonstrate specific harm without a protective order, as  
 15 required by Federal Rule of Civil Procedure 26(c). (See Opp'n at 2,  
 16 3 (citing United States v. Patkar, No. CR. 06-00250 JMS, 2008 WL  
 17 233062, at \*4 (D. Haw. Jan. 28, 2008))). But the very case that  
 18 defendant relies on for that proposition - United States v. Patkar -  
 19 correctly noted that "[t]he Ninth Circuit has yet to define what  
 20 constitutes 'good cause' to restrict discovery pursuant to Federal  
 21 Rule of Criminal Procedure 16," and cautioned against directly  
 22 importing the civil standard of requiring specific harm and  
 23 individualized good cause under Federal Rule of Civil Procedure

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25 <sup>1</sup> See, e.g., Stipulation and Joint Request for a Protective  
 26 Order Regarding Discovery Containing Personally Identifiable  
 27 Information and Other Private and Law Enforcement Sensitive  
 28 Information, United States v. Stauffer, ED CR 17-174-JGB (C.D. Cal.  
 Sept. 25, 2017), ECF No. 6, ¶¶ 2-4; Stipulation Regarding Protective  
 Order, United States v. Flores, ED CR No. 16-85-JGB (C.D. Cal. Sept.  
 16, 2016), ECF No. 7, ¶¶ 2-4.

1 26(c), even while recognizing reference to Rule 26(c) as "a useful  
2 tool." Patkar, 2008 WL 233062, at \*4. As noted above, this Court,  
3 as well as district judges throughout the Central District of  
4 California, regularly issues protective orders based on showings of  
5 good cause - whether stipulated or not - that are substantively  
6 identical to the showing made by the government in the ex parte  
7 application here. Although the request for the Protective Order was  
8 made some time after the commencement of the case, and in light of  
9 the low showing the government may make, there is no principled  
10 reason for this Court to change the standard now.

11 Good cause clearly exists for this Court to restrict possession  
12 and dissemination of the discovery that contains PII and the explicit  
13 depictions of sexual acts involving victims. That defendant has  
14 possessed some of those materials for many years and that some months  
15 have elapsed since the government's initial production do not  
16 diminish the objective fact that the materials are extremely private,  
17 and sensitive, and deserve protection by this Court.

18 **II. THE PROTECTIVE ORDER APPROPRIATELY BALANCES THE PRIVACY  
19 INTERESTS OF THE VICTIMS AND THIRD PARTIES WITH DEFENDANT'S  
RIGHT TO PREPARE FOR TRIAL AND PRESENT A DEFENSE**

20 After his counsel twice declined to discuss the language of a  
21 reasonable stipulation for a protective order to address the PII and  
22 explicit sexual materials in the discovery, defendant now asserts  
23 that the Protective Order is "overbroad," and in so doing  
24 mischaracterizes the Protective Order. The Protective Order, as  
25 proposed, balances the privacy rights of the victims and third-party  
26 individuals while preserving defendant's ability to prepare for trial  
27 and present a vigorous defense. The Court thus should enter the  
28 Protective Order as requested.

1       In a nutshell, the cornerstone of the Protective Order is that  
2 the discovery may not be transmitted to persons outside the "Defense  
3 Team," which is a standard provision found in protective orders  
4 entered in federal criminal cases. (Ex Parte Application, Dkt. No.  
5 23, ¶¶ 6, 8.) In light of defendant's representation in the  
6 opposition that "[n]one of the discovery has been disseminated  
7 outside of Mr. Olivas' defense team" since the discovery was produced  
8 in August 2018 (Opp'n at 2), the restriction on dissemination  
9 preserves the status quo and would not create an unreasonable  
10 impediment to the defense.<sup>2</sup>

11       Unlike many protective orders entered in the Central District,  
12 the Protective Order does not prevent defendant from retaining  
13 possession of the discovery, except for a subset of materials that  
14 contain private and sensitive content such as PII (such as social  
15 security numbers, dates of birth, and home addresses of victims and  
16 other individuals) and sexually explicit photos and video recordings.  
17 (Ex Parte Application, Dkt. No. 23, ¶ 14.) As defendant notes, his  
18 longstanding possession of some of the materials at issue has a  
19 mitigating effect on the significant concern that remains for  
20 transmission outside the defense team and for purposes outside this  
21 case. But the fact remains that defendant has no cause to retain  
22 possession of the victims' and third parties' PII or the sexually  
23 explicit materials that were created during the time period when,  
24 according to the indictment and the government's assessment of the  
25 evidence, defendant was continually depriving the victims of their

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28       <sup>2</sup> "Defense Team" was defined in the government's ex parte  
application (Dkt. No. 23, ¶ 9) and the government continues to adopt  
that definition in this reply.

1 rights secured by the Constitution and the laws of the United States,  
2 including the right to be free from deprivations of liberty without  
3 due process of law, which includes the right to bodily integrity.  
4 Those materials, given defendant's charged conduct that includes  
5 aggravated sexual abuse and attempted aggravated sexual abuse,  
6 deserve added protection.

7 If the Court enters the requested Protective Order, the  
8 government intends to designate the materials containing PII and  
9 sexual act materials that deserve heightened protection, as  
10 envisioned in paragraph 14 of the ex parte application, to give  
11 defendant clear notice as to which materials should only be in the  
12 rest of the Defense Team's possession but not in his personal  
13 possession. Even if the implementation of the Protective Order may  
14 create some inconvenience for defendant and the Defense Team, the  
15 significant privacy interests of the victims and third parties  
16 outweigh the logistical inconvenience defendant would face. With the  
17 trial date continued by more than six months and modest additional  
18 discovery envisioned by the government (except for any created in the  
19 course of trial preparation), any burden to the defense imposed by  
20 the Protective Order will not be substantial, and definitely not  
21 unreasonable.

22 Finally, defendant's complaint that requiring witnesses to agree  
23 to be bound by the Protective Order is too burdensome is unpersuasive  
24 and speculative. (See Opp'n at 5.) Defendants before this Court and  
25 throughout the Central District regularly enter into protective  
26 orders like the one the government has proposed, and their defense  
27 teams and witnesses regularly agree to the terms of similar  
28 protective orders without undue diminishment of their ability to

1 defend against the charges in those cases. It strains credulity to  
2 think that the defense witnesses would refuse to agree to non-  
3 disclosure of the private, sensitive information in this case  
4 involving serious sexual abuse conduct and PII of various  
5 individuals.

6 The Protective Order reasonably protects the privacy interests  
7 of the victims and third parties without creating a substantial  
8 impediment to defendant's right to prepare for trial and present a  
9 defense.

10 **III. DEFENDANT MISCHARACTERIZES GOVERNMENT COUNSEL'S GOOD-FAITH  
11 EFFORTS TO BALANCE THE COMPETING INTERESTS IN THIS CASE**

12 Defendant's opposition mischaracterizes the government's conduct  
13 and representations regarding the discovery and the Protective Order.  
14 Principally, defendant incorrectly suggests that the government did  
15 not "review the discovery before producing it, and now it is trying  
16 to force the defense to fix its supposed mistake" of not seeking a  
17 protective order at the outset. (Opp'n at 4.) As the government  
18 explained in the ex parte application, the government did not  
19 initially request a protective order because "defendant was presumed  
20 to be already in possession of the PII and the sexual materials prior  
21 to the government's production of the discovery" (Ex Parte  
22 Application, Dkt. No. 23, ¶ 4) – not because, as defendant  
23 insinuates, it had failed to fully review the discovery or because it  
24 had mistakenly neglected to request a protective order. Nor was the  
25 government's decision not to seek a protective order at the outset an  
26 acknowledgment that there was no good cause for a protective order.  
27 Rather, the government's decision was an attempt at balancing the  
28 competing interests of defendant and the victims, while recognizing

1 that a protective order may not be effective, given the length of  
2 defendant's possession of some of the materials at issue. The  
3 government's recent re-assessment and decision to request the  
4 Protective Order does not make its initial decision a mistake, much  
5 less an irreversible mistake that effected a waiver or forfeiture of  
6 the government's right to seek a protective order, as defendant  
7 suggests.<sup>3</sup> The Court should enter the Protective Order as submitted.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the government respectfully requests  
10 that the Court grant the government's ex parte application and issue  
11 the Protective Order.

12 Dated: April 18, 2019

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15  
16 /s/  
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<sup>3</sup> The government disputes several statements contained in the opposition regarding the parties' April 1, 2019 telephone call. But since those statements do not bear directly on the government's ex parte request, the government is not addressing those disputes here.